IN THE

Supreme Court of the United States

October Term, 1976

No. 76-~~——~~
~~——~~76-675 -

THEODORE L. SENDAK,
Attorney General of Indiana
DANIEL C. BURRY,
Prosecuting Attorney of the
26th Judicial Circuit of Indiana
THE HONORABLE MYLES F. PARRISH,
Judge of the Adams Circuit Court,

Appellants,

vs.

CLYDE NIHISER, d/b/a
MOVIELAND DRIVE-IN THEATER,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION

JURISDICTIONAL STATEMENT

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Appellee.

JURISDICTIONAL STATEMENT

Appellants Theodore L. Sendak, as Attorney General of Indiana, Daniel C. Burry, as Prosecuting Attorney of the 26th Judicial Circuit of Indiana, and the Honorable Myles F. Parrish, as Judge of the Adams Circuit Court, appeal from the Memorandum of Decision and Order and the Judgment of the United States District Court for the Northern District of Indiana, sitting as a three-judge court pursuant to 28 U.S.C. § 2284, declaring unconstitutional

and enjoining the enforcement of an Indiana statute providing for an action against a place where obscene materials are produced or displayed as a nuisance.

OPINION BELOW

The Memorandum of Decision and Order of the District Court appealed from in this appeal has not been reported. That ruling of the District Court entered anew a prior Memorandum and Decision and Order which is reported at 405 F. Supp. 482. That prior decision was vacated and remanded by this Court, which order is found at 96 S. Ct. 378. Both District Court opinions are set forth in the Appendix hereto.

JURISDICTION

This appeal is taken from a final Judgment of the United States District Court for the Northern District of Indiana, sitting as a three-judge court pursuant to 28 U.S.C. § 2284. That Judgment granted a declaratory judgment that the Indiana statute is unconstitutional and void and a permanent injunction against the enforcement of the statute. The Complaint in the action alleged jurisdiction under the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, 28 U.S.C. § 2201, 2202 and 1343 (3) and (4), and Rules 57 and 65 of the Federal Rules of Civil Procedure. The Judgment was entered on August 17, 1976, pursuant to the District Court's Memorandum of Decision and Order of August 16, 1976. Notice of Appeal was filed in the United States District Court for the Northern District of Indiana, Fort Wayne Division, on September 16, 1976.

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1253, as construed in *Goldstein v. Cox,* 392

U.S. 471 (1970). The statute involved in Indiana Code (I.C.) 35-30-10.5, which is set forth in the Appendix hereto.

QUESTION PRESENTED ON APPEAL

Whether the District Court erred in refusing to abstain in a case involving a state statute which has never been construed by state courts but was the basis of pending state court action, and in giving that statute a strained and unrealistic interpretation so as to make it unconstitutional.

STATEMENT OF THE CASE

The General Assembly of Indiana in 1973 enacted a statute whereby a place wherein obscene and pornographic material are exhibited may be declared a public nuisance. On October 12, 1973, appellant Burry filed an action in the Adams Circuit Court to declare Nihiser's establishment, which was showing the film "Deep Throat," to be such a nuisance. A subpoena duces tecum was issued for that film and other films in his possession as well as a list of titles of films which had been shown over the prior three years. Nihiser was also enjoined from removing or interfering with the personal property, specifically including films, used in the drive-in theater operation. A hearing was scheduled for October 19, 1973.

On October 18, 1973, Nihiser filed this action in federal court. Appellants (hereafter the State) filed a Consolidated Motion to Dismiss and Motion to Strike. The portions thereof relevant to this appeal asserted that the case was a proper one for abstention by the federal court and that the statute could reasonably be construed as to be constitutional. On June 4, 1974, the District Court entered a Memorandum of Decision and Order denying that Motion.

That Memorandum of Decision and Order is set forth in the Appendix hereto. The District Court ruled that, for purposes of a Motion to Dismiss, it was not necessary to determine whether the statute was constitutional but only whether the Complaint could be construed so as to present a cause of action. (p. A-22, *infra.*) That Memorandum then set forth possible interpretations of the statute under which it would be unconstitutional (See, e.g., pp. A-27-28, *infra.*)

On July 25, 1974, Nihiser filed a Motion for Summary Judgment, which was granted by the District Court on November 14, 1974. That Memorandum of Decision and Order, set forth at p. A-8, *infra,* incorporated by reference the analysis of the statute contained in the ruling on the Motion to Dismiss. Appellant Sendak appealed to this Court, presenting the issue of abstention. On November 17, 1975, this Court vacated the judgment of the District Court and remanded for further consideration in light of *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975). The parties briefed that question and on August 16, 1975, the District Court entered its Memorandum of Decision and Order reinstating its ruling of November 14, 1974. Judgment was entered on August 17, 1976. The State filed its Notice of Appeal on September 16, 1976.

THE QUESTION PRESENTED IS SUBSTANTIAL

This case is before this Court for the second time on the recurring questions of federalism and comity which arise when an action is filed in a federal court challenging the constitutionality of a state statute. The option presented to the federal court which best fulfills those federalism and comity interests is abstention to allow decision of the question in the state courts. There are at least two

types of cases in which this Court has held absention to be proper. Both are present in this case.

One such type of case is that in which there are ambiguities in the statute which could be clarified by state courts so as to obviate the possible constitutional defects or so as to present them in a significantly different light. *Lake Carriers Association v. Mac Mullen,* 406 U.S. 498 (1972); *Harrison v. N.A.A.C.P.,* 360 U.S. 167 (1959). The state courts can, if necessary, place a limiting construction on a statute so as to restrict the effect of its provisions to constitutional limits. It was noted in the District Court that the statute involved here is very similar, even largely identical, to the Ohio statute involved in the case of *Huffman v. Pursue, Ltd., supra.* This Court noted that the Supreme Court of Ohio had applied such a limiting construction in the case of *State ex rel. Ewing v. A Motion Picture Film Entitled "Without a Stitch,"* 37 Ohio St. 2d 95, 307 N.E. 2d 911 (1974).

What the District Court did in this case was exactly the contrary of the policy behind the abstention doctrine. First, the District Court refused to abstain to allow a state court construction of the statute. Then the District Court deliberately sought to find that construction which would make the statute most clearly unconstitutional. This was done by ruling on the Motion to Dismiss that the court must construe the law as well as the facts most favorably to the plaintiff. (p. A-28, *infra*). The Motion to Dismiss, as the equivalent of the demurrer, admits the facts of the Complaint *arguendo.* But while the court must consider any possible state of the facts which would allow relief, issues of law are for the court to determine as a matter of law. Thus, conclusions of law are not considered to be admitted even when alleged in the complaint as fact. 2A *Moore's Federal Practice,* § 12.08.

Then after having construed the statute by this unusual rule for purposes of the Motion to Dismiss, the District Court adopted the construction into its final opinion and ruling by reference. (p. A-9, *infra*). Under that procedure it is unlikely that any state legislature could ever enact any statute, no matter how innocuous, which would withstand a constitutional challenge. Serious issues of federalism are clearly presented by such procedure. It is submitted that the necessary presupposition of the District Court must have been that the courts of the State of Indiana would act in bad faith in construing Indiana statutes without regard to the Constitutions of the United States and of the State of Indiana, which constitutions Indiana judges have sworn to uphold. The Judgment of the District Court should thus be reversed.

The second type of case in which abstention is particularly appropriate is the situation in which the relief sought in federal court would be the enjoining of the continuance of a state court proceeding or a similar degree of interference in the state court proceeding. That rule is found in *Younger v. Harris,* 401 U.S. 37, (1971), and companion cases, in the context of a state criminal prosecution. *Huffman v. Pursue, Ltd., supra,* extended the *Younger* rule to at least some civil cases in which the interest of the state in the issue under consideration is clear.

Huffman is clearly applicable to this action. The state interests are identical since the statutes involved are extremely similar. The Complaint in the District Court specifically alleged the existence of the state court action. The state court judge and the plaintiff in the state court case were made defendants in the federal action. The injunction issued provided that defendants:

> "are permanently and perpetually restrained and enjoined from enforcing or proceeding under the Indiana Nuisance Act, I.C. 35-30-10.5." (p. A-13, *infra.*)

Thus, a state court action brought by a state official to uphold the interests of the people of the State of Indiana was enjoined.

The District Court ruled that this case comes under the exception, stated in *Younger* and *Huffman* as a hypothetical possibility, of a statute "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." (p. A-3. *infra*). One alleged constitutional defect in the statute was noted, and reference was made to the "numerous glaring constitutional defects" set forth in the prior opinion of the District Court. (p. A-5, infra). But those alleged defects are in a statute largely identical with that in *Huffman,* and this Court held in *Huffman* that:

> ". . . such a characterization of the statute is not possible after the subsequent decision of the Supreme Court of Ohio in *State ex rel. Ewing* . . ." 420 U.S. at —, 95 S.Ct. at 1212.

Those "numerous glaring constitutional defects" were at least subject to a limiting construction and thus not improper "in whatever manner and against whomever an effort might be made to apply it."

The one alleged defect which the District Court was able to specify which is not covered by *Huffman* is the question of the definition of obscenity used therein. The statute was enacted shortly before this Court's opinion in *Miller v. California,* 413 U.S. 15 (1973), and companion cases. In *Miller,* this Court invited the state courts to construe

pre-existing statutes in light of those new standards. 413 U.S. at 24, fn. 6. This Court proceeded to give such a construction to very general language in a pre-existing federal obscenity statute in *United States v. 12 200 ft. Reels of Super 8MM Film,* 413 U.S. 123 (1973), a companion case to *Miller.*

The Supreme Court of Indiana declined to adopt the *Miller* standards for its pre-existing *criminal* laws. *Mohney v. State,* —Ind. —. 300 N.E. 2d 66 (1973); *Stroud v. State,* — Ind. —, 300 N.E. 2d 100 (1973). The District Court assumed that the Indiana courts would apply the same standards to the statute in this case. But while the interests of the State are the same here as in a criminal case, and while the District Court considers the statute here to be similar to a criminal statute, it cannot be stated as a matter of certainty that the Indiana courts would use the same rules of construction as to this statute that they do to criminal statutes. As noted by this Court in *United States v. 12 200 ft. Reels, supra,* construction of state statutes is a matter left to state courts.

Indiana law as to construction of criminal statutes provides for a strict construction in favor of the accused.

> "Ambiguities in the criminal law, which is statutory, shall be construed most favorably to the accused." *Shaw v. State,* 247 Ind. 139 at 145 (1965). See also *Utley v. State,* 258 Ind. 443 (1972).

While the Supreme Court of Indiana *might* apply these same standards in this case, it *might* instead use less strict standards applicable to non-criminal statutes. Abstention would allow that determination to be made by the court having authority to make it.

Moreover, even if it were accepted *arguendo* that the Supreme Court of Indiana would find the statutory

language insufficient, such a finding would not bring the case within the *Younger* and *Huffman* exception of unconstitutionality "in every clause, sentence and paragraph." Whatever this Younger exception involves, which question does not appear to have been answered in any case but merely left as a hypothetical possibility, the standard is clearly more than would be involved here. The *Younger* decision was emphatic that the unconstitutionality of a statute on its face is not sufficient, 401 U.S. at 53-54, since the rationale behind the rule is one of federalism and comity. It was the dissent in *Younger* that would have allowed injunctive relief against any unconstitutional state statute. 401 U.S. at 59.

CONCLUSION

For the foregoing reasons, Appellants urge this Court to note probable jurisdiction over this case, set the cause for plenary consideration and reverse the Judgment of the United States District Court for the Northern District of Indiana with explicit and specific instructions to abstain so as to allow a determination of this case in state court.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

DARREL K. DIAMOND
Assistant Attorney General

Attorneys for Appellants

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CLYDE NIHISER, d/b/a MOVIELAND DRIVE-IN THEATER,	)	
Plaintiff,	)	
v.	)	Civil No. 73 F 93
THE HONORABLE THEODORE L. SENDAK, in his capacity as Attorney General of the State of Indiana, ET AL.,	)	
Defendants.	)	

MEMORANDUM OF DECISION AND ORDER

This cause is now before the court on remand from the Supreme Court of the United States, 96 S.Ct. 378 (November 17, 1975), for reconsideration of defendants' motion to dismiss in light of *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). The only issue to be decided is whether this court should have abstained from exercising its jurisdiction in order not to interfere with a pending state court proceeding between the State of Indiana and plaintiff herein. For reasons given below, we conclude that abstention would have been, and is, improper and therefore deny the motion.

The facts are stated at length at 405 F. Supp. 482, 484-85. In 1973 the Indiana legislature enacted the Indiana Pornographic Nuisance Act, Ind. Code §§ 35-30-10.5-1 to -10 (Burns 1975). The Act was at that time supplemental to the general criminal provisions prohibiting obscenity, Ind. Code 35-30-10-1 to -3 (1971) (since repealed). While the Pornographic Nuisance Act employs a civil remedy for suppression of obscenity, the Act was classified under Title 35 (criminal code) and uses the same definitions as the criminal statute. *Compare* Ind. Code § 35-30-10.5-1(d) ("lewd, indecent, lascivious, or obscene films") *with* former Ind. Code § 35-30-10-1 (repealed 1975) ("obscene, lewd, indecent, or lascivious literature"). *See generally* Note, *Defects in Indiana's Pornographic Nuisance Act*, 49 Ind. L.J. 320, 323 (1974). The Act on its face appears to be virtually a copy of the statute involved in *Huffman v. Pursue, Ltd.*, 95 S.Ct. 1200 (1975), set forth at length in *id.* at 1204 nn. 2 & 5, 1205 n.8.

Plaintiff operates a movie theater. Because plaintiff presented the movie "Deep Throat," defendant Burry, a county prosecuting attorney, brought suit in state court to enjoin the "nuisance." Pursuant to the Act, plaintiff was ordered to produce the film, to produce a list of all titles of films shown in the past three years, and to produce for inspection all other films in his possession. Notice and summons to appear for a hearing on the temporary injunction to abate the "nuisance" were issued. *See generally Nihiser v. Sendak*, 405 F. Supp. 482, 484-85 (N.D. Ind. 1974).

It was at this stage of the state court proceeding that plaintiff filed suit in this court, seeking to enjoin enforcement of the Act against him, on the grounds that the Act was unconstitutional on its face and as applied. Our inquiry

here is limited to the question whether under these circumstances abstention would have been appropriate.

Huffman, supra, held that abstention could be appropriate where the pending state action was civil rather than criminal, and since the pending state proceedings in *Huffman* were precisely the same manner of state proceedings involved here, a superficial application of *Huffman* here would favor abstention.

Huffman recognized, however, that a statute might be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it," 95 S.Ct. at 1212, such that no valid conviction in the pending state proceeding could be had under the challenged statute. In such a situation, the federal court need not stay its hand while the state court defendant pursues his relief through the state courts, for if it is foreordained that the defendant in the state proceedings *must* prevail, as a matter of federal constitutional law, there is no purpose to be served by subjecting him to the expense of trial and appeal in state court and to the resulting disruption of his business and private life when a speedy and direct remedy may be had in federal court.

Huffman presents the problem of the state statute, seemingly unconstitutional on its face, which might yet be saved by a narrowing construction by a state court. In fact, the statute in *Huffman, unlike* the statute here, had already received such a saving, narrowing construction as to the definition of "obscene." *See* 95 S.Ct. at 1204 n.4. As noted there, the Ohio Supreme Court had narrowed the coverage of Ohio's act by construing "lewd, indecent, lascivious, or obscene films" to mean those films which would be obscene under Ohio's criminal obscenity statute.

State ex rel. Keating v. A Motion Picture Film Entitled "Vixen," 27 Ohio St.2d 278, 272 N.E.2d 137 (1971). Furthermore, the Ohio Supreme Court thereafter determined that the criminal obscenity provisions, as incorporated in the pornographic nuisance statute, met the criteria of *Miller v. California,* 413 U.S. 15 (1973). *See* 35 Ohio St. 215, 301 N.E.2d 880 (1973), discussed in *Huffman, supra,* 95 S.Ct. at 1204 n.4. It was appropriate, then, that in *Huffman,* the district court found the statute as thus construed *not* to be unconstitutionally vague, *see* 95 S.Ct. at 1205-06, and the Supreme Court had before it in *Huffman* only the question whether the enforcement provisions of the Act contravened First Amendment rights. Under the Act (both Ohio's and Indiana's), once the court has found that a nuisance exists, the court is to enjoin the showing of all films for one year, except where the owner may demonstrate that the films are nonobscene. This part of the Ohio statute (and of the Indiana statute as well) had *not* been construed by any Ohio court at the time the district court entered judgment in *Huffman.* The Supreme Court held that as to this claim the federal court should have abstained to allow the federal plaintiff to secure his federal rights in the pending state proceedings.

We have before us, however, a statute which not only has not been limited by Indiana courts so as to avoid unconstitutional vagueness; rather, the precise definitional section which plaintiff challenges here as unconstitutionally vague has already been struck down by the Indiana Supreme Court as impermissibly vague in light of *Miller, supra. See Mohney v. State,* 300 N.E.2d 66 (Ind. 1973); *Stroud v. State,* 300 N.E.2d 100 (Ind. 1973); *see also Mohney v. State,* 300 N.E.2d 678 (Ind. App. 1973); *Thomas v. State,* 303 N.E.2d 293 (1973) At the time this court entered judgment in this cause, there was *no* statutory definition of

obscenity as applicable to adults which a state court could borrow in construing the Pornographic Nuisance Act, and the definition actually employed in the Act had but recently been found unconstitutionally vague in the complementary criminal obscenity statute.

The memorandum of decision and judgment in this cause entered November 14, 1974 identified numerous glaring constitutional deficiencies in the Act. The vagueness of the definition of obscenity was and is in itself sufficient to strike down the statute, and in light of the rulings in *Mohney* and *Stroud* striking down Code §§ 35-30-10-1 to -3 in light of *Miller,* it was and is inevitable that the same definitional shortcomings undercut the Pornographic Nuisance Act. When the Indiana Supreme Court struck down Ind. Code §§ 35-30-10-1 to -3, for all practical purposes it ruled against the identical provisions of the Act now before the court. Unless the Indiana Supreme Court were to overrule its decisions in *Mohney* and *Stroud*—a possibility which this court may not presume—the simple fact is that a judgment in state court against plaintiff herein would *necessarily* be reversed on appeal in light of *Mohney* and *Stroud.*

In light of the unconstitutional vagueness of the Act, apparent on its face and so recognized by the Indiana Supreme Court in the context of a parallel statute, there was and is no need to abstain.[1]

---

[1] It should be noted that the definitional vagueness is compounded by the provision of Ind. Code § 35-30-10.5-5. There, by statute, "evidence of the general reputation of the place . . . is prima-facie evidence of such [pornographic] nuisance and of knowledge of and of acquiescence and participation therein on the part of the person charged with maintaining said nuisance." By statute, the prosecutor may meet his burden of proving "obscenity" by merely introducing evidence that defendant's business is reputed to deal in obscene films. The formation of a reputation in the community, however,

ORDER

Accordingly, defendants' motion to dismiss is denied, and the judgment and order of this court of November 14, 1974 is hereby entered anew.

Entered this 16th day of August, 1976.

LUTHER M. SWYGERT

United States Circuit Judge

JESSE E. ESCHBACH

United States District Judge

ROBERT A. GRANT

United States District Judge

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is a matter which inherently cannot be subject to *Miller* standards. In short, where the prosecutor employs reputation evidence rather than direct evidence, he avoids having to apply and prove even the vague elements of the cause of action set forth in Section 35-30-10.5-1(d).

Judgement on Decision by the Court CIV 32 (7-63)

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CLYDE NIHISER, d/b/a MOVIELAND DRIVE-IN THEATER	)	CIVIL No. 73 F 93
vs.	)	
THE HONORABLE THEODORE SENDAK, ET AL	)	

This action came on for decision before the Court, Honorable Jesse E. Eschbach, Luther M. Swygert, Robert Grant, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged

This cause having been remanded from the Indiana Supreme Court for further consideration, defendants' motion to dismiss is denied and the judgment and order of this court of November 14, 1974 is hereby entered anew.

Dated at Fort Wayne, Indiana, this 17th day of August, 1976.

FRANCIS T. GRANDYS

Clerk of Court

By WANDA WEBSTER

Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CLYDE NIHISER, d/b/a MOVIELAND DRIVE-IN THEATER, *Plaintiff,*	)	
v.	)	CIVIL NO. 73 F 93
THE HONORABLE THEODORE L. SENDAK, in his capacity as Attorney General of the State of Indiana, ET AL., *Defendants.*	)	

MEMORANDUM OF DECISION AND ORDER*

This civil rights action is before the court on plaintiff's motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P., filed July 25, 1974. Defendants have filed no response to plaintiff's motion. For the reasons stated below, plaintiff's motion will be granted.

Plaintiff filed his complaint on October 18, 1973, seeking a temporary restraining order and temporary and permanent injunctions to restrain defendants from proceeding under Public Law 336 of the 1973 Acts of the Indiana General Assembly. I.C. 35-30-10.5 (hereinafter referred to as the Indiana Nuisance Statute). The Indiana Nuisance Statute provides procedures for declaring a place which

* Judge Beamer indicated an intention to approve the holding of this decision but died on October 21, 1974 before the opinion was drafted.

produces or displays obscene films a nuisance. Injunctive relief was sought by plaintiff under the provisions of 42 U.S.C.A. § 1983, 28 U.S.C.A. § 1331, 28 U.S.C.A. § 1343, 28 U.S.C.A. § 2284(3) and Rule 65, Fed. R. Civ. P. Plaintiff also sought to have the Indiana Nuisance Statute declared unconstitutional, basing jurisdiction for declaratory relief on 28 U.S.C.A. §§ 2201, 2202 and Rule 57, Fed. R. Civ. P. A three-judge court was sought pursuant to 28 U.S.C.A. §§ 2281 and 2284 and upon a finding by the court on October 19, 1973, that plaintiff's complaint presented a substantial federal question, the court requested the convening of a three-judge court. On October 29, 1973, the request was granted, and a three-judge court was designated.

On June 4, 1974, this court entered a lengthy memorandum of decision and order denying defendants' motion to dismiss this action for failure to state a claim upon which relief could be granted. In that memorandum, the court set forth the factual background of the case and dealt at length with plaintiff's allegations and defendants' contentions in response. The court held that this was not an appropriate case for abstention and dealt at length with the constitutional requirements applicable to state regulation of obscenity. This court's memorandum of June 4, 1974, setting forth the analysis and legal authorities upon which this court relies in granting plaintiff's motion for summary judgment, is now incorporated herein by reference. The facts of this case are not in dispute, and the only remaining issues are those of law. Therefore, this case is an appropriate one for disposition upon summary judgment. In determining the constitutionality of the Indiana Nuisance Statute on plaintiff's motion for summary judgment, this court must decide (1) whether the definition of nuisance meets the requirements of the recent United

States Supreme Court rulings on obscenity regulations, and (2) whether the procedures employed in the statute impose prior restraints.

The Indiana Nuisance Statute in Section 2 provides that a person who owns, conducts or is employed by the owner of a nuisance shall be guilty of maintaining a nuisance and shall be enjoined. Section 1(d) provides that:

> "Nuisance" means any place . . . in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, . . . are . . . screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose . . .

This court now holds that the words "lewd, indecent, lascivious, or obscene," as contained in the statutory definition of "nuisance," do not meet the standard of specificity set forth by the Supreme Court of the United States in *Miller v. California,* — U.S. —, 93 S.Ct. 2607 (1973). The Indiana Nuisance Statute makes no attempt to define the sexual conduct, depiction of which would be prohibited by the statute. In addition, the definition of "nuisance" has not been authoritatively construed by the state courts in order to come within the *Miller* guidelines. In fact, the Indiana Supreme Court has explicitly refused to so construe similar language contained in the Indiana criminal obscenity statute, and in *Mohney v. State,* — Ind. —, 300 N.E.2d 66 (1973) and *Stroud v. State,* — Ind. —, 300 N.E. 2d 100 (1973), held that the criminal statute was unconstitutional.

Plaintiff contends that the procedures employed by the Indiana Nuisance Statute for abatement of a nuisance constitute a prior restraint on First Amendment freedoms.

The restraining order issued on October 12, 1973, against the plaintiff was issued pursuant to Section 4 of the Indiana Nuisance Statute which provides in part:

> Where such application for a temporary injunction is made, the court may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court granting or refusing such temporary injunction and until the further order of the court thereon.

An *ex parte* order prior to an adversary hearing and judicial determination of obscenity was approved by the Supreme Court in *Paris Adult Theatre I v. Slaton,* — U.S. —, 93 S.Ct. 2628 (1973). However, the *ex parte* order approved in that case specifically provided that, although the films could not be removed from the premises until the date of the hearing, it was permissible for the owners to exhibit them and, thus, no prior restraint on exhibition existed. Under the Indiana Nuisance Statute and the order issued by the Adams County Circuit Court, which is framed in the language of the statute, the person charged with maintaining the nuisance is prohibited from "interfering" with the personal property and contents of the place until the hearing on the temporary injunction. "Interfering" could arguably encompass an exhibition of any and all films pending a hearing. Plaintiff asserts in support of his motion for summary judgment that he has been prohibited from exhibiting motion picture films pending an adversary hearing. Defendants have not contested plaintiff's statement. Thus, during the ten (10) days allowed by the Indiana Nuisance Statute between the time the petition for abatement of a nuisance is filed and the hearing on the temporary injunction is held, a defendant can be

prevented from "interfering" with any films, even though the films may be within the protection of the First Amendment. Therefore, relying on the reasoning and authority set forth in the memorandum of decision of June 4, 1974, this court now holds that the Indiana Nuisance Statute operates as a prior restraint on First Amendment rights.

As the court stated on June 4, 1974, the statute also allows injunctive and closing orders against films which are not yet in dispute; it authorizes the seizure and destruction of materials, which have not been declared obscene, by application of a prima facie evidence rule; and it authorizes seizure and sale of equipment which can be utilized for protected as well as unprotected materials. Such remedial provisions encourage and allow prior restraint of materials when the nature of those materials has not been determined, and allow seizure of any material which can be found on the premises without any judicial determination that any particular material is obscene. The statutory scheme allows seizure and destruction of presumptively constitutional materials or undeniably permitted materials merely because they are found in a place which has a reputation of exhibiting obscene films, and allows for permanent future restraint against the exhibition of materials unless the owner carries the burden of demonstrating that they are not obscene. He must determine at his peril what is literally or arguably within the definition of "nuisance." *Cf. Baggett v. Bullitt,* 377 U.S. 360, 84 S.Ct. 1316 (1964). The statutory scheme directly impinges on the right to disseminate unquestionably protected materials and allows injunction of future operations of a theater disseminating presumptively constitutional materials on the basis of the "reputation" of the theater in the past. Even if such injunctive relief were based on the obscene nature of past exhibitions, it would be objectionable, but its invalidity is even clearer in the instant action where the theater owner may be required to defend not only his showing of "Deep Throat" but any one of the movies run in the last three years, the titles of which were subpoenaed.

ORDER

Accordingly, plaintiff's motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P., is hereby granted. It is considered, ordered, adjudged, and declared that the Indiana Nuisance Statute, I.C. 35-30-10.5, is unconstitutional under the First and Fourteenth Amendments to the United States Constitution. It is further considered, ordered, adjudged, and decreed that the defendants, their agents and employees, and all those acting by and through them are permanently and perpetually restrained and enjoined from enforcing or proceeding under the Indiana Nuisance Act, I.C. 35-30-10.5.

Entered this 14th day of November, 1974.

LUTHER M. SWYGERT

Chief Judge
United States Court of Appeals

JESSE E. ESCHBACH

Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CLYDE NIHISER, d/b/a MOVIELAND DRIVE-IN THEATER, *Plaintiff,*	)	
v.	)	CIVIL NO. 73 F 93
THE HONORABLE THEODORE L. SENDAK, in his capacity as Attorney General of the State of Indiana;	)	
THE HONORABLE DANIEL C. BURRY, in his capacity as Prosecuting Attorney of the 26th Judicial Circuit, Adams, County, Indiana;	)	
THE HONORABLE MYLES F. PARRISH, as Judge of the Adams Circuit Court, Adams County, Indiana, *Defendants.*	)	

MEMORANDUM OF DECISION AND ORDER

This civil rights action is before the court on defendants' consolidated motion to di miss pursuant to Rule 12(b)(6), Fed. R. Civ. P., and motion to strike pursuant to Rule 12(f), Fed. R. Civ. P. Defendants' motions will be denied.

Plaintiff filed his complaint on October 19, 1973, seeking a temporary restraining order and temporary and perma-

nent injunctions to restrain defendants from proceeding under Public Law 336 of the 1973 Acts of the Indiana General Assembly. I.C. 35-30-10.5 (hereinafter referred to as the Indiana Nuisance Statute). The Indiana Nuisance Statute provides procedures for declaring a place which produces or displays obscene films a nuisance. Injunctive relief was sought by plaintiff under the provisions of 42 U.S.C.A. § 1983, 28 U.S.C.A. § 1331, 28 U.S.C.A. § 1343, 28 U.S.C.A. § 2284(3) and Rule 65, Fed. R. Civ. P. Plaintiff also sought to have the Indiana Nuisance Statute declared unconstitutional, basing jurisdiction for declaratory relief on 28 U.S.C.A. §§ 2201, 2202 and Rule 57, Fed. R. Civ. P. A three-judge court was sought pursuant to 28 U.S.C.A. §§ 2281 and 2284 and upon a finding by the court on October 19, 1973, that plaintiff's complaint presented a substantial federal question, the court requested the convening of a three-judge court. On October 29, 1973, the request was granted, and a three-judge court was designated.

The facts are not substantially disputed. On October 12, 1972, defendant Daniel C. Burry, Prosecuting Attorney for Adams County, Indiana, filed a verified petition to enjoin and abate a public nuisance. On the same day, a restraining order was issued from the Adams Circuit Court by the Honorable Myles F. Parrish, also a defendant in this action. A subpoena duces tecum was issued ordering plaintiff to appear before the Adams Circuit Court and to bring with him the film "Deep Throat" along with all other motion pictures he had in his possession and a list of titles and play dates for all films exhibited over the last three years. Notice and summons to appear for a hearing on a temporary injunction to abate a public nuisance requested in the petition were also issued on that date.

On October 18, 1973, plaintiff brought the instant action alleging that Adams County Prosecuting Attorney Burry, Adams Circuit Court Judge Parrish, and Indiana Attorney General Sendak, by enforcement of the Indiana Nuisance Statute were depriving or planned to deprive plaintiff of his rights under the United States Constitution. The complaint alleges that the Indiana Nuisance Statute as written and as applied to plaintiff is an example of an unconstitutional prior restraint on First Amendment rights. Plaintiff alleges that defendants are attempting under color of state law to suppress motion pictures presumptively protected under the First Amendment without a prior determination that said films are in fact obscene under current Constitutional standards. Such an attempt is alleged to constitute a prior restraint on 1st, 5th and 14th Amendment rights in that it restricts plaintiff in the exercise of his rights to see, disseminate and distribute presumably protected material to the interested adult public of Adams County, Indiana, as well as infringing on the rights of those adults to view such material. Consequently, since the statute operates as a prior restraint on protected rights, it does and will continue to have a chilling effect on 1st Amendment freedoms. It is alleged such conduct of defendants by enforcement and use of the statute perpetuates such a chilling effect on the rights of plaintiff and the adult citizens of Adams County, Indiana, to view non-obscene films.

Plaintiff also asserts that his 1st and 5th Amendment rights are violated by use of the Indiana Nuisance Statute because the acts proscribed are defined in such vague and indefinite terms that normal men must guess at their meaning. In the absence of adequate safeguards, it is alleged that such vague and overbroad provisions are a violation of procedural due process required by the 5th Amendment.

These alleged vague and overboard provisions are said to be susceptible of sweeping and improper application by defendants, amounting in practice to impermissible censorship powers which will constitute a prior restraint on the exercise of First Amendment rights and have an inhibiting and chilling effect on the exercise of such rights.

Plaintiff further alleges that defendants' conduct in seeking to close plaintiff's business deprives plaintiff of his 5th Amendment rights. It is stated that defendants' conduct is aimed at intimidating plaintiff in the conduct of his trade or business and that plaintiff will suffer a complete loss of profits. It is also argued that plaintiff has suffered and will suffer damage by interference with his business relations and that this will cause him irreparable harm and incalculable loss for which no remedy exists at law.

It is further alleged that the Indiana Nuisance Statute violates "substantive due process" of the 5th and 14th Amendments by authorizing a deprivation of liberty and property interests by defendants by use of unreasonable, arbitrary and capricious means without a showing of any real and substantial relationship to a state interest compelling enough to justify state action to limit the exercise of plaintiff's Constitutional rights. It is alleged that equal protection is violated by rendering a business subject to closure under the guise of abating a nuisance on the basis of isolated transactions as to a few out of thousands of presumptively protected motion pictures without having to show that a nuisance exists. Because of such violations of plaintiff's Constitutional rights, plaintiff seeks to have the Indiana Nuisance Statute declared unconstituional and seeks an injunction to prevent defendants from proceeding under its provisions.

Defendants moved to dismiss plaintiff's amended complaint for failure to state a claim upon which relief can be granted. Defendants first argue that allegations in the complaint that the Indiana Attorney General and the Prosecuting Attorney for Adams County are necessary parties are not supported by the statutory language. It is also argued that the Indiana Nuisance Statute is constitutional because it complies with all the requirements set forth by the United States Supreme Court's recent decisions on obscenity. *See,*

Miller v. California, — U.S. —, 93 S.Ct. 2607 (1973);

Paris Adult Theatre I v. Slaton, — U.S. —, 93 S.Ct. 2628 (1973);

Kaplan v. California, — U.S., — 93 S.Ct. 2680 (1973);

United States v. 12 200-ft. Reels of Super 8mm Film, — U.S. —. 93 S.Ct. 2665 (1973);

United States v. Orito, — U.S. —, 93 S.Ct. 2674 (1973).

The defendants challenge plaintiff's allegations that the Indiana Nuisance Statute is not sufficiently explicit in describing the proscribed acts as required by *Miller, supra.* Defendants argue that the Indiana courts may construe the Indiana Nuisance Statute in the future to comply with the dictates of *Miller.* The Supreme Court in *Miller* sanctioned such construction in order to save state statutes, the constitutionality of which may have been jeopardized by the new ruling. In addition, defendants argue that this is a civil suit and that the recent rulings by the Indiana Supreme Court that criminal statutes employing identical language to define the proscribed acts were unconstitutional have no bearing on the instant action. It is argued that the state has an interest in enjoining public nuisances and that issuance of an injunction in order to abate a public nuisance is an effective and constitutional method. It is argued that the Indiana Nuisance Statute does not operate as a prior restraint in that it is only aimed at pornographers. It is further argued that the only order which can be issued prior to an adversary hearing was approved by the Supreme Court. Thus, defendants seek a dismissal of the action.

Defendants also argue that this case is a proper one for the application of the abstention doctrine. Defendants submit that this action is one in which the federal court should abstain to allow interpretation of the statute in Indiana courts. Thus, defendants argue the case should be dismissed for reasons of comity between state and federal courts.

Finally, defendants move to strike paragraph four in the prayer for relief on the grounds that it is vague. All of defendants motions will be denied.

I.

The first question raised in defendants' motion to dismiss is whether the Attorney General of the State of Indiana and the Prosecuting Attorney for Adams County, Indiana, are "necessary parties." The amended complaint states that Attorney General Sendak and Prosecuting Attorney Burry were named as defendants because they were officials authorized under the Indiana Statute "either initially or as a necessary party of the State of Indiana, to abate a 'nuisance' . . ." Section 3 of the Indiana Nuisance Statute provides that:

> [w]henever a nuisance exists, the attorney general, the prosecuting attorney of the county in which such

> nuisance exists, or any person who is a resident of such county may bring an action to abate such nuisance and to perpetually enjoin the person maintaining the same from further maintenance thereof. IC 35-30-10.5.

It is clear that the statute authorizes the Attorney General for the State and the prosecuting attorneys of the counties to commence actions pursuant to the statute's provisions. It is the Attorney General for the State and the county prosecuting attorneys who are charged with the primary duty of seeking abatement of nuisances on behalf of the State. Although the statute provides that a private citizen may bring an action, certain restrictions are placed on any such action. Since the named public officials have the authority to proceed under the statute, they are proper parties defendant.

II.

Plaintiff's allegations that the Indiana Nuisance Statute is unconstitutional is more seriously contested. The statute in Section 2 provides that a person who owns, conducts or is employed by the owner of a nuisance shall be guilty of maintaining a nuisance and shall be enjoined. Section 1(d) provides that:

> "Nuisance" means any place . . . in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, . . . are . . . screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose . . .

Plaintiff challenges this section alleging that the recent Supreme Court holding in *Miller v. California, supra* requires more specificity in defining the proscribed acts than

is set out by the Indiana Nuisance Statute. Defendants argue that the Indiana Nuisance Statute fully complies with *Miller's* standards.

In *Miller v. California. supra,* the Supreme Court reaffirmed the holding that obscene material is not protected by the First Amendment. *Id.* at 2614. However, while recognizing the right of the states to limit the dissemination of obscene materials, the Court acknowledged that inherent dangers exist in attempting to regulate any form of expression. The Court then cautioned that state statutes attempting to regulate obscene materials must be carefully limited. The Court set forth a new standard for testing the constitutionality of state statutes:

> . . . we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. *Id.* at 2614-15.

See also, Paris Adult Theatre I v. Slaton, supra at 2641-42. Plaintiff argues that the words "lewd, indecent, lascivious, or obscene . . ." do not meet the specificity standard set forth by the Court in *Miller.* To counter this argument defendants point to Footnote six of the Court's opinion in *Miller, supra* at 2615. This footnote was a response by the majority of the Court to an argument by Mr. Justice Brennan in his dissent in *Paris Adult Theatre I v. Slaton, supra* at 2653, Footnote 13. Mr. Justice Brennan had observed:

> While the Court's modification of the *Memoirs* test is small, it should still prove sufficient to invalidate virtually every state law relating to the suppression of obscenity. For under the Court's restatement, a statute must specifically enumerate certain forms of

> sexual conduct, the depiction of which is to be prohibited. It seems highly doubtful to me that state courts will be able to construe state statutes so as to incorporate a carefully itemized list of various forms of sexual conduct, and thus bring them into conformity with the Court's requirements.

Mr. Justice Brennan, whose dissent was joined by Justices Stewart and Marshall, argued that under the new standards enunciated by the Court all states but Oregon would be forced to re-write their obscenity statutes to meet the required level of specificity. The majority in Footnote Six responded: "other existing state statutes, as construed heretofore or hereafter, may well be adequate." Defendants argue that the Indiana Nuisance Statute may well be supplied with a construction meeting the required level of specificity and that the statute should not be ruled unconstitutional. It is argued that the statute under attack is a civil statute and need not be strictly construed. Defendants argue that the decisions of the Indiana Supreme Court holding that the State's criminal obscenity statutes are unconstitutional are not applicable.

It should be noted that the majority did not challenge Mr. Justice Brennan's statement that a state statute must specifically enumerate certain forms of sexual conduct to meet the *Miller* requirements. The majority merely took issue with his observation that state courts will not be able to supply their obscenity statutes with a definition of the proscribed conduct in terms sufficiently specific to comport with *Miller's* dictates. Therefore, plaintiff's attack on the statutory definition of nuisance has a sound basis under *Miller's* standards. It is not necessary, in considering a motion to dismiss, to determine whether the Indiana Nuisance Statute is constitutional. On a motion to dismiss, pursuant to Rule 12(b)(6), Fed. R. Civ. P., it is only necessary to decide whether plaintiff presents any valid claim for relief in his complaint. *Orphan v. Furnco Constr. Corp.*, 466 F.2d 795 (7th Cir. 1972); *Jung v. K & D Mining Co.*, 260 F.2d 607 (7th Cir. 1958); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (1969). Defendants' arguments that plaintiff's complaint does not state a cause of action cannot be accepted. As pointed out above, the Supreme Court in *Miller* required that state statutes designed to regulate obscenity must be carefully limited. *Id.* at 2614. This requirement was not aimed only at state criminal statutes. *See, Paris Adult Theatre I v. Slaton, supra.* In addition, the Court in *Smith v. California,* 361 U.S. 147, 80 S.Ct. 215 (1959), *rehearing denied,* 361 U.S. 950, 80 S.Ct. 399, stated that:

> Stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. *Id.* at 151, 80 S.ct. 217-18.

The new requirement that statutes dealing with obscenity must specifically describe the acts prohibited focuses on this principle. Thus, whether the Indiana Nuisance Statute is labeled as civil or criminal will not change the requirement that the prohibited conduct must be specifically described.

The argument that the statute is not criminal and need not be strictly construed against the state will not save a constitutionally defective statute. The state can no more trammel the rights guaranteed in the Constitution by use of a civil statute than it can by use of a criminal statute. The argument that the statute need not be strictly construed because it is not criminal is of no effect in light of the express requirement set out in *Miller* that state

statutes regulating obscenity must specifically describe the illegal acts.

Although the Indiana Nuisance Statute provides a civil remedy, it contains many punitive features and is couched with language indicating its quasi-criminal nature. Section 2 of the Indiana Nuisance Statute provides that:

> Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed or in control of any such nuisance by any such owner, agent, or lessee *is guilty of maintaining a nuisance* and shall be enjoined as provided in sections 3 to 6 inclusive of this chapter. (Emphasis added).

The fact that a person can be found "guilty" of maintaining a nuisance and the fact that the statute is a part of the Criminal Code indicate its punitive nature. Also Section 8 of the Statute provides for the imposition of a tax of $300 on one against whom an injunction for maintaining a nuisance was issued. But if a person is found "innocent" or has abated the nuisance, no such "tax" is imposed. This would indicate that the tax authorized by the statute is in the nature of a fine imposed for violating the statute. Yet the safeguards normally required in a criminal action, including guilt beyond a reasonable doubt, are not required. The punitive nature of the statute is obvious when it can be used to fine a person, confiscate his property or terminate his business.

In *Mohney v. State,* —Ind. —, 300 N.E.2d 66 (1973) and *Stroud v. State,* — Ind. —, 300 N.E.2d 100 (1973), the Indiana Supreme Court held that the Indiana criminal obscenity statute was unconstitutional. The cases were before the court on remand from the Supreme Court of the United States, —U.S. —, 93 S.Ct. 3040 (1973), and —

U.S. —, 93 S.Ct. 3038 (1973), for consideration in light of *Miller* and its companion cases. The court held that the statute was too general in nature and did not specifically set forth the sexual or obscene acts which would constitute a violation of the statute. *See also, Mohney & Geraghty v. State,* 38 Ind. Dec. 364 (Ind. App. 1973). The statute found in violation of the First Amendment defined the proscribed acts in terms of "obscene, lewd, indecent or lascivious," the same words used in the Indiana Nuisance Statute. *See* I.C. 1971, 35-30-10-1 [Burns' Ind. Stat. Ann. § 10-2803 (1956 Repl.)]; I.C. 1971, 35-30-10-3 [Burns' Ind. Stat. Ann. § 10-2803a (1956 Repl.)]. No attempt was made by either the Indiana Supreme Court or the Appellate Court to construe either section of the statute to impart the required specificity. Thus, the Indiana courts have had opportunities to construe the words challenged in this suit and to more specificially describe what would constitute an "obscene, lewd, indecent or lascivious" act and have declined to do so. Plaintiff's attack on the Indiana Nuisance Statute does raise substantial constitutional questions and is not subject to dismissal for failure to state a claim upon which relief can be granted.

Defendants argue that *Paris Adult Theatre I v. Slaton, supra,* is materially the same as the instant action and supports defendants' position. Defendants argue that in *Evans Theatre Corp. v. Slaton,* 227 Ga. 377, 180 S.E.2d 712 (1971) (cited by the United States Supreme Court in *Paris Adult Theatre I)* it was recognized that the state has the right to maintain an action to enjoin an existing or threatened public nuisance. Defendants argue that the Indiana Nuisance Statute is within the scope of approved state action under *Paris Adult Theatre I* and *Miller* since the statute only applies to cases involving the showing of films which come within the definition of obscene. With-

out reviewing the difficulties encountered in trying to determine which films come within the definition of obscene, it is clear that the *Paris Adult Theatre I* case and the *Evans Theatre Corp.* case do not dispose of the problems presented in the instant action. In *Paris Adult Theatre I,* the Court upheld the use of a civil injunction of the exhibition of obscene materials even under a statute which adopts the criminal definition of "obscene materials. *Paris Adult Theatre I v. Slaton, supra* at 2633. The Court held that the Georgia statutory procedure did not constitute a prior restraint on First Amendment rights and that Georgia had a legitimate right to regulate commerce in obscene material and also regulate the exhibition of obscene material. However, the Court premised this holding on the provision that applicable Georgia law, as written or authoritatively interpreted by the Georgia courts complied with the newly adopted standard of specificity. The Court consequently remanded for a determination of whether the *Miller* standards were met.

It is clear that the *Paris Adult Theatre I* case and the *Evans Theatre Corp.* case support defendants' arguments that a state can regulate the dissemination of obscene materials by the use of civil injunctions. However, it is not questioned that a civil remedy of this nature can be used to combat obscenity provided constitutional safeguards are met. But this is not an issue in this case. The questions presented in the instant action in relation to the statute are: (1) is the definition of "nuisance" sufficiently specific under *Miller* standards and (2) do the procedures employed in the statute violate due process or impose prior restraints? The first question was not answered by the Supreme Court in *Paris Adult Theatre I.* The second question was presented in *Paris Adult Theatre I,* but the Georgia statutory procedure was much different than that

utilized in the Indiana Nuisance Statute. Thus, it is not at issue whether Indiana can regulate obscenity by enjoining the proscribed activity. What is at issue is whether the definition of prohibited acts and procedures authorized to remedy a violation are proper under First, Fifth and Fourteenth Amendment standards. Defendants' arguments fail to convince this court that no valid claim or issue is presented.

III.

On October 12, 1973, a restraining order was issued by the Adams Circuit Court ordering plaintiff and anyone else who claimed any ownership rights, title or interest in the motion picture film entitled "Deep Throat" to refrain from

> "removing or in any way or in any manner interfering with any of the personal property, film or films or contents of the location known as Movieland Drive-In Theatre until the date of the hearing on the temporary injunction . . ."

This order was posted with the admonition that its removal or mutilation was punishable by contempt of court.

This restraining order was issued pursuant to Section 4 of the Indiana Nuisance Statute which provides in part:

> Where such application for a temporary injunction is made, the court may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court granting or refusing such temporary injunction and until the further order of the court thereon.

This section also requires the officer who serves the order to make and return into court an inventory of the personal property and contents situated and used in conducting or maintaining such nuisance.

Plaintiff argues that an order of this type violates his First and Fourteenth Amendment rights in that it constitutes an illegal prior restraint on the exercise of those rights. Defendants contend that the issuance of an order of this type prior to an adversary hearing and judicial determination on the merits of the obscenity issue is not in violation of any constitutionally protected rights and is a procedure approved by the United States Supreme Court in *Paris Adult Theatre I v. Slaton, supra.* However, this case does not support defendants' argument. The *ex parte* order approved in *Paris Adult Theatre I* specifically provided that, although the films could not be removed from the premises until the date of the hearing, it was permissible for the owners to exhibit them and, thus, no prior restraint on exhibition existed. Under the Indiana Nuisance Statute and the order issued by the Adams County Circuit Court, which is framed in the language of the statute, the person charged with maintaining the nuisance is prohibited from "interfering" with the personal property and contents of the place until the hearing on the temporary injunction. Whether "interfering" could encompass an exhibition of the film is not clear. Plaintiff is entitled to show that the statute could be used to prohibit exhibition prior to an adversary hearing on the obscenity issue. Defendants are not entitled to dismissal since plaintiff does present a valid attack on Section 4 of the Indiana Nuisance Statute. *See, Pursue Ltd. v. Huffman,* No. C 72-432 (N.D. Ohio W.D. April 20, 1973).

Plaintiff relies on *Pursue Ltd. v. Huffman, supra,* in support of his argument that this action to abate a nuisance

under the Indiana Nuisance Statute constitutes a prior restraint on his First Amendment rights. In *Pursue* the court was presented with a constitutional attack on three sections of the Ohio Nuisance Statute, O.R.C. §§ 3767.01, *et seq.*, which are almost identical to corresponding sections of the Indiana Nusiance Statute. The court held that the definition of "nuisance" in O.R.C. § 3767.01(C) as "any place in or upon which lewd, indecent, lascivious or obscene films . . . are . . . exhibited" afforded adequate protection to constitutional rights. However, this decision was reached before *Miller,* and its continued vitality under the new constitutional standards is questionable.

The *Pursue* court also held that O.R.C. § 3767.04 was unconstitutional insofar as it authorizes the state courts to close theatres without a prior adversary hearing on the obscenity question. That section of the Ohio Nuisance Statute, which in material respects is identical to Section 4 of the Indiana Act, had provided that, if, at the time the temporary injunction is issued, and unless the owner of the nuisance shows that it is abated, an order shall issue closing the place for any purpose of lewdness, etc. Thus, plaintiff argues that the *Pursue* decision supports its position that the Indiana statute is unconstitutional because it provides remedies which can be used and are being used as a restraint on plaintiff's First Amendment rights. Defendants deny that Section 4 authorizes unconstitutional procedures and state that no prior restraints are imposed because a hearing is provided prior to the issuance of a temporary injunction.

Any system of prior restraints on expression comes before the court bearing a heavy presumption against its constitutional validity. *Bantam Books Inc. v. Sullivan,* 372 U.S. 58, 70, 83 S.Ct. 631, 39 (1963). However, the protection against prior restraints is not unlimited and where obscene

matters are involved an exception to an absolute ban on prior restraints exists. *Near v. State of Minnesota ex rel. Olson,* 283 U.S. 697, 51 S.Ct. 625 (1931); *Kingsley Books v. Brown,* 354 U.S. 436, 77 S.Ct. 1325 (1957). But any restraint on First Amendment rights is tolerated only where it operates under judicial supervision where the defendant can be assured of an almost immediate judicial determination of the validity of the restraint. *Bantam Books Inc. v. Sullivan, supra* at 70, 83 S.Ct. 639. *See also, Kingsley Books Inc. v. Brown, supra.* The Fourteenth Amendment requires that regulation by the states of obscenity must conform to procedures which will safeguard constitutionally protected expression. *Bantam Books Inc. v. Sullivan, supra.* Regulations of obscenity must scrupulously embody the most rigorous procedural safeguards. *Smith v. California,* 361 U.S. 147, 80 S.Ct. 215 (1959); *Marcus v. Search Warrants,* 367 U.S. 717, 81 S.Ct. 1708 (1961). Therefore,

> [a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.

Freedman v. Maryland, 380 U.S. 51, 59, 85 S.Ct. 734, 39 (1965).

Section 4 of the Indiana Nuisance Statute is challenged in the instant action because it is alleged not to provide the procedural safeguards mandated by the Supreme Court. In *Pursue Ltd., supra,* similar provisions were ruled unconstitutional if they operated to allow closing a theater without a prior adversary hearing on obscenity. In *Kingsley Books v. Brown, supra* at 1328, the court stated that it is necessary to look at the operation and effect of the statute in order to determine whether it affects a prior restraint. Plaintiff has the right to prove that the operation

of Section 4 of the Indiana Nuisance Statute will create a prior restraint on protected rights. For this reason his claim cannot be dismissed.

The court in *Pursue Ltd., supra,* held that O.R.C. § 3767.06 was unconstitutional. This statute provided that upon a determination that a nuisance existed on a given premise, the court could order the premises closed *for any purpose* for a period of one year unless the owner obtains a release from such order by demonstrating that the nuisance has been abated. Section 6 of the Indiana Nuisance Statute is similar to O.R.C. § 3767.06 except that it does not allow closing the place "for any purpose" but only for further maintaining the place as a nuisance. Although the *Pursue Ltd.* court focused on the language "for any purpose," the court also stressed the fact that the statute made no provision for a hearing on any of the films which the owner intended to show during the one year period. The Indiana statute only enjoins maintaining the place as a nuisance but it does not provide for any hearings to determine whether films which the owner may have proposed to exhibit during the year enjoined were protected by the First Amendment. Instead, the statute puts the burden on the owner to prove that he has abated the nuisance, and of persuading the courts that the movies he plans to show are protected by the First Amendment. But the First Amendment demands that the Government must assume this burden. *Blunt v. Rizzi,* 400 U.S. 410, 18, 91 S.Ct. 423, 29 (1971). The infirmity of this Section of the Indiana Nuisance Act is summarized by the *Pursue* court's description of the defects in O.R.C. §3767.06:

> . . . upon a determination that as few as one or two films shown at a given theatre are obscene, the theatre can be ordered closed under this Section for a period of one year regardless of the nature of any other films

> which the owner or operator may have intended to show during that period, with the burden falling on the owner to come into court and prove the non-obscenity of any such other films.

Although the Indiana Nuisance Statute in Section 6 does not allow closing the theater for all purposes, it will have such an effect unless it is determined beforehand what films the exhibitor proposes to show during that year will not constitute a nuisance. The statute leaves the burden on the exhibitor to seek judicial approval for each film. Thus, the *Pursue Ltd.*[1] decision does raise questions concerning prior restraints which plaintiff has a right to argue apply equally to the Indiana Nuisance Statute. Dismissal of the action would deprive him of his opportunity and it is unwarranted.

In summary, plaintiff presents sufficient legal questions to state a cause of action and avoid dismissal under Rule 12(b)(6). The definitional sections of the statute are properly challenged in light of the Miller standards. It is also arguable that many of the procedures authorized by the statute can be used to effectuate prior restraints on First Amendment rights or deny due process. Plaintiff does state a claim upon which relief can be granted.[2]

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[1] The United States Supreme Court has granted review of this case. The Court presumably will review the constitutionality of the Ohio Nuisance Statute and will also review the absention issue. *Huffman v. Pursue Ltd.*, 42 U.S.L.W. 3517 (1974).

[2] For a more detailed analysis and critique of the Indiana Nuisance Statute, *see*, Note, Defects in Indiana's Pornographic Nuisance Act, 49 Ind.L.J. — (1974).

IV.

Defendants argue that this action is one in which the federal court should abstain in order to allow the Indiana court to interpret the statute. It is argued that construction of the statute may eliminate some of its unclarity and perhaps avoid the constitutional question. Although defendants' argument presents a difficult question for the court, this case is not a proper one in which principles of comity require abstention by this court.

It is a clearly established principle that the federal courts are charged with the primary duty of vindicating federal rights, *Escalera v. New York City Housing Authority,* 425 F.2d 853, 865 (2nd Cir. 1970), *cert. denied,* 400 U.S. 853, 91 S.Ct. 54 (1970). The federal courts have a duty to hear cases which Congress has extended jurisdiction of to the courts unless an exception to the exercise of that jurisdiction exists. *Federal Savings and Loan Ins. Corp. v. Krueger,* 435 F.2d 633, 37 (7th Cir. 1970). One such exception is the so-called abstention doctrine which was set forth in *Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643 (1941). The doctrine requires that when a federal court is presented a controversy which involves unsettled questions of state law, the federal court should defer decision on the federal question until the state court has had a reasonable opportunity to construe or interpret the state law. *See, Railroad Comm'n of Texas v. Pullman, Co., supra; England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S.Ct. 461 (1964); Pell, *Abstention—A Primrose Path by Any Other Name,* 21 DEPAUL L. REV. 931, 32 (1972). The paradigm case for abstention is one where a construction by the state courts of the challenged statute could avoid or modify the federal constitutional question. *Lake Carriers' Assn. v. MacMullan,* 406

U.S. 498, 92 S.Ct. 1749, 1757 (1972); *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 76, 79 S.Ct. 1025, 1030 (1959).

In *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151 (1972), the court held that the Anti-Injunction Statute, 28 U.S.C.A. § 2283 does not prohibit a federal court from enjoining state court action pursuant to provisions of the Civil Rights Act, 42 U.S.C.A. § 1983. However, the court pointed out that the holding in the case did "not question or qualify in any way the principles of equity, comity and federalism that must restrain a federal court when asked to enjoin a state proceeding." *Id.* at 2162. In the concurring opinion of Mr. Chief Justice Burger, in which Justices White and Blackmun joined, it was stated that these principles of equity, comity and federalism in the context of the pending state *criminal* proceedings allow a federal court to issue an injunction in only a narrow set of circumstances. It was then stated that the Court has not yet reached the question of how great a restraint is imposed on a federal court by these principles when asked to enjoin state civil proceedings. *Id.* at 2163.

Considerations of comity are less compelling in a civil case in that the offense to state interests is less extensive. *See Younger v. Harris*, 401 U.S. 37, 55, 91 S.Ct. 746, n. 2 (1971) (concurring opinion of Justice Stewart); *Cousins v. Wigoda*, 463 F.2d 603 (7th Cir. 1972), *appeal denied*, 409 U.S. 1201, 92 S.Ct. 2610.

However, the burden on the individual plaintiff is also less severe when left to his state court remedies, and the disruptive effect on federalism is not dissipated. *See Lynch v. Snepp*, 472 F.2d 769, 774, n.5 (4th Cir. 1973). Moreover, attempts to enforce civil provisions such as the one here may be characterized as civil proceedings utilized to enforce the criminal laws and thus subject to *Younger* in

any event. *See Palaio v. McAuliffe*, 466 F.2d 1230 (5th Cir. 1972); *Speight v. Slaton*, 356 F.Supp. 1101 (N.D. Ga. 1973), *vacated*, 42 L.W. 4300 (1974). The best approach is not to regard labels "civil" and "criminal" as controlling, but to analyze the competing interests which each case presents. *See Palaio, supra* at 1233. In any case, a federal court should stay its hand when a single suit would be adequate to protect the rights asserted. If the federal court is to intervene, it should plainly appear that such a course would not afford adequate protection. *Younger, supra* at 44-45, 91 S.Ct. at 750-51.

In *Younger v. Harris, supra*, the court held that a federal court cannot enjoin a state criminal action even if the state statute upon which the criminal action is based is attacked as being unconstitutional on its face, and having a chilling effect on constitutional rights. The court did, however, leave room for federal injunctive relief in a pending state action in certain exceptional circumstances where "the danger of irreparable injury is both great and immediate," 401 U.S., at 45, 91 S.Ct., at 751 or where state law is "flagrantly and patently violative of express constitutional prohibitions," 401 U.S., at 53, 91 S.Ct., at 755, or where there is a showing of "bad faith, harassment, or . . . other unusual circumstances" calling for equitable relief. 401 U.S., at 54, 91 S.Ct., at 755. The Court stated that:

> Certain types of injury, in particular the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a simple criminal prosecution.

Taken alone, the fact that plaintiff faces possible sanctions in the state court proceeding is no foundation

for holding that the threat to federal rights is one which cannot be eliminated by defense in a single state court proceeding. A civil proceeding to determine the obscenity of certain materials, even when it involves a preliminary injunctive procedure, amounts to no more of a prior restraint than a criminal prosecution. *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 77 S.Ct. 1325 (1957). Accordingly, any threat which the proceeding invokes is not inevitably one which cannot be eliminated through defense in a single proceeding, regardless of any "chilling effect" which may occur as a result. *See Byrne v. Karalexis,* 401 U.S. 216, 220, 91 S.Ct. 777, 779-80 (1971). Nor is defense in a single proceeding insufficient because the statutory scheme is susceptible to invalid applications. *See Younger, supra* at 47, 91 S.Ct. at 752 n.4. However, in the instant action the issue of obscenity will be decided in an *in rem* proceeding brought in equity to abate a nuisance. Certain criminal protections must necessarily be lost by the use of civil proceedings to enforce the criminal code. *See Speight v. Slaton, supra* at 1105 (dissenting opinion). While this by itself does not make a state court remedy inadequate to protect constitutional rights, it certainly is an important relevant factor to consider in balancing the disruptive effect on federalism which may result if this court should provide injunctive relief against the harm which may be suffered by the plaintiff. In short, it is significant when considering whether "unusual circumstances" exist in this case which would fit it into an exception to *Younger.*

There are several other reasons why intervention in this case is appropriate. The statutory scheme here is arguably in several respects "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Watson*

v. Buck, 313 U.S. 387, 402 61 S.Ct. 962, 967 (1941). The prima facie rule is clear and subject to no limiting construction, and thus no state court construction could eliminate the issue presented. It not only places unwarranted burdens in the way of challenges to the application of the definitional sections of the statute but allows restraint of materials without a judicial determination of the alleged obscenity of the materials and without placing the burden of proof upon the censor. *See Freedman, supra* at 58, 85 S.Ct. at 739 (burden of proof); *Teitel Film Corp. v. Cusack,* 390 U.S. 139, 141, 88 S.Ct. 754, 756 (1968) (judicial determination of obscenity).

Moreover, the remedy provisions provide that upon entry of a final injunction, an order "shall direct the removal from the place of the personal property and contents used in conducting the nuisance," "shall direct the sale of such thereof as belong to the defendants," and that even though obscene materials as defined in the statute "shall be confiscated and destroyed," a closing order shall remain in effect for one year unless the owner of the property furnishes a bond and proves his innocence of any knowledge of the use of the property and that he could not with reasonable diligence have known of such use. "Every defendant in the action is presumed to have had knowledge of the general reputation of the place." I.C. 35-30-10.5-6.

In addition, Section 5 of the Statute provides that in the action for a temporary injunction to close the establishment until a hearing on the permanent injunction can be had

> "evidence of the general reputation of the place . . . is admissible for the purpose of proving the existence of said nuisance and is *prima-facie evidence* of such nuisance and of knowledge of and of acquiescence and participation therein on the part of the person charged with maintaining the nuisance." (Emphasis added).

"Personal property" as defined in the statute includes "all mechanical equipment used for . . . projection or viewing [obscene films]." I.C. 35-30-10.5-1. Unlike a criminal charge, the nuisance abatement procedures shift the burden to the owner to prove that his place is not a nuisance when there is evidence that the general reputation of the place is that it is a nuisance. Similarly, if the place is closed for one year under Section 6, the owner again has the burden of showing that he no longer maintains a nuisance or has abated it.

The statute also allows injunctive and closing orders against films which are not yet in dispute since those in dispute must be destroyed; it authorizes the seizure and destruction of materials which have not been declared obscene by application of the prima facie evidence rule, and it authorizes seizure and sale of equipment which can be utilized for protected as well as unprotected materials. Such remedial provisions encourage and allow prior restraint of materials when the nature of those materials has not been determined and allow seizure of any material which can be found on the premises without any judicial determination that any particular material is obscene. The statutory scheme allows seizure and destruction of presumptively constitutional materials or undeniably permitted materials merely because they are found in a place which has a reputation of exhibiting obscene films and allows for permanent future restraint against the exhibition of materials unless the owner carries the burden of demonstrating that they are not obscene. He must determine at his peril what is literally or arguably within the definition of "nuisance." *Cf. Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316 (1964). Under such circumstances, federal intervention is not only allowable, but compelled. *See Speight, supra* at 1104-1105 (dissenting opinion). The

statutory scheme directly impinges on the right to disseminate unquestionably protected materials and allows injunction of future operations of a theater disseminating presumptively constitutional materials on the basis of the "reputation" of the theater in the past. Even if such injunctive relief were based on the obscene nature of past exhibitions, it would be objectionable, but its invalidity is even clearer in the instant action where the theater owner may be required to defend not only his showing of "Deep Throat" but any one of the movies run in the last three years, the titles of which were subpoenaed. *See Speight, supra* at 1107 (dissenting opinion).

We agree with Judge Morgan in *Speight* that the state has no right to seize and destroy protected materials (here, the projection equipment and materials which have been found obscene based on the reputation of the place) merely because they are found in conjunction with unprotected materials. Nuisance procedures such as these are attempts to circumvent the criminal requirements of jury verdicts requiring proof beyond a reasonable doubt and civil proceedings to determine the obscinity of specific materials. Such attempts at abatement can never be constitutionally permissible under any reasonable construction of the statute because they directly impinge on the dissemination of constitutionally protected materials never adjudicated obscene. *See Speight, supra* at 1108-1109 (dissenting opinion).

Finally, the definitional section of the statute is flagrantly and patently in violation of express constitutional guarantees, given the refusal of the Indiana Supreme Court to construe similar language in the corresponding criminal provisions.

See Mohney v. State, — Ind. —, 300 N.E.2d 66 (1973); *Miller v. California*, — U.S. —, 93 S.Ct. 2607 (1973).

Both the Indiana Supreme Court and the Indiana Court of Appeals have been given a reasonable opportunity to construe the language used to define a nuisance but have declined to give it the specificity mandated by *Miller*. In *Mohney v. State, supra,* on remand from the Supreme Court of the United States to the Indiana Supreme Court for reconsideration in light of the recent obscenity cases the Indiana Supreme Court stated:

> (t]he main thrust of those opinions so far as applicable to this case, is that the statute under which appellant was convicted is unconstitutional for the reason that it is too general in nature and does not set out specifically the sexual or obscene acts which, when depicted in any of the media named by the statute, constitute a violation of the statute.

The Court held that I.C. 1971, 35-30-10-3 [Burns' Ind. Stat. Ann. § 10-2803a (1956 Repl.)] was unconstitutional. That statute made it a violation to send into this state "any obscene, lewd, indecent or lascivious literature" etc. These are the exact words used to define a "nuisance" in the Indiana Nuisance Statute. The Indiana Supreme Court has found these words to be insufficiently specific under *Miller* and has refused to construe them. In *Stroud v. State, supra,* the statute, I.C. 1971, 35-30-10-1 [Burns' Ind. Stat. Ann. § 10-2803 (1956 Repl.)] was found to be unconstitutional for the same reasons stated in *Mohney*. The statute in *Stroud* also used the words "obscene, lewd, indecent or lascivious" and again the court refused to construe them. *See also, Mohney* and *Geraghty v. Indiana, supra.* Thus, it cannot be contended that the Indiana courts have not had a reasonable opportunity to construe the words "lewd, indecent, lascivious and obscene" which form the foundation of the Indiana Nuisance Statute.

For the reasons given, this case presents sufficient "unusual circumstances" which warrant the court in declining to abstain from deciding the issues presented.[3]

V.

Defendants move pursuant to Rule 12(f) to strike paragraph 4 of the prayer for relief which states:

> And further, from otherwise harassing plaintiff in the conduct of its lawful business, without first securing and providing for, after due notice to the plaintiff, a judicially superintended prior adversary hearing on the issue of obscenity, in the constitutional sense.

Defendants contend that the vagueness of this request requires that it be stricken. This motion is also denied.

Motions under Rule 12(f), Fed. R. Civ. P., are viewed with disfavor and are infrequently granted. *Teachers Ins. and Annuity Ass'n of America v. Northridge Corp.,* 55 F.R.D. 1 (E.D. Wis. 1972); *Lippman Inc. v. Hewitt-Robins Inc.,* 55 F.R.D. 439 (E.D. Wis. 1972). In order for defendants to succeed on the motion to strike, it must be shown that the challenged allegation is unrelated to plaintiff's claims and is so unworthy of any defense that its presence would prejudice the moving party. *Augustus v. Board of Public Instruction of Escambia City, Fla.,* 306 F.2d 862

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[3] Although too recently decided to be cited by any party to the instant litigation, we have read and considered the case of *O'Shea v. Littleton,* 42 U.S.L.W. 4139 (1974) and conclude that it does not alter our decision that principles of equitable restraint do not require that we abstain in this action for the reasons expressed in this decision. The circumstances, issues and relief requested in the instant action are distinguishable from *O'Shea.* Intervention of this court in the state proceedings as requested by plaintiff would not require an intrusive disruption of state criminal proceedings which was eschewed in *O'Shea.*

(5th Cir. 1962); *Dunbar & Sullivan Dredging Co. v. Jurgensen Co.*, 44 F.R.D. 467 (S.D. Ohio 1967), *aff'd*, 396 F.2d 152 (6th Cir. 1968). Although defendants are correct that the challenged paragraph is vague, it cannot cause any prejudice to defendants. If the court determines that plaintiff is entitled to injunctive relief, the court is confident that such relief can be framed without prejudice to either party. In addition, the challenged paragraph is consistent with plaintiff's claims that the challenged statute effectuates a prior restraint in that it does not provide for adequate notice nor provide for a determination of obscenity prior to any action restraining plaintiff. In essence, the challenged paragraph merely requests that the Indiana Nuisance Statute not be enforced against him because of these constitutional defects and prays the court to enjoin any action taken pursuant to that statute. If defendants prove their argument that the Indiana Nuisance Statute already provides for the safeguards requested in paragraph four, then plaintiff's prayer will be denied. If it is found that adequate safeguards are lacking, then the court can frame its order to prevent enforcement of the defective statutory provisions without prejudice to either party. In either case, defendants will not be prejudiced. Therefore, the motion to strike is denied.

Defendants' motion to dismiss for failure to state a claim upon which relief can be granted or because the court is required to abstain from hearing this case is denied. The defendants' motion to strike is also denied.

Entered this 4th day of June, 1974.

LUTHER M. SWYGERT

Chief Judge,
United States Court of Appeals

GEORGE M. BEAMER

Chief Judge,
United States District Court

JESSE E. ESCHBACH

Judge,
United States District Court

FILED SEPTEMBER 16, 1976
FRANCIS T. GRANDYS, CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CLYDE NIHISER, d/b/a MOVIELAND DRIVE-IN THEATER	)	
Plaintiff,	)	
vs.	)	CIVIL NO. 73 F 93
THE HONORABLE THEODORE L. SENDAK, ET AL	)	
Defendants.	)	

NOTICE OF APPEAL

Defendants Honorable THEODORE L. SENDAK, Honorable Daniel C. Burry and Honorable Myles F. Parrish, by counsel, Theodore L. Sendak, Attorney General of Indiana, by Darrel K. Diamond, Assistant Attorney General, hereby give notice that they hereby appeal to the United States Supreme Court, pursuant to 28 U.S.C. § 1253, from the Judgment of this Court of August 17, 1976 and the Memorandum of Decision and Order of this Court of August 16, 1976, declaring Indiana statutes, I.C. 35-30-10.5-1 to 10, to be unconstitutional and enjoining the enforcement of such statutes.

Respectfully submitted,

THEODORE L. SENDAK

Attorney General of Indiana

by DARREL K. DIAMOND

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STATUTORY PROVISIONS

Chapter 10.5. Nuisances—Pornographic.

Sec. 1. As used in this chapter: (a) "Place" includes any building, structure or any separate part or portion thereof or the ground itself;

(b) "Person" includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

(c) "Personal Property", as used in this chapter, means any lewd, indecent, lascivious, or obscene film or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, glass slides, either in negative or positive form designed for exhibition by projection on a screen, and all mechanical equipment used for their projection or viewing, except the personal tools of trade of an employed projectionist;

(d) "Nuisance" means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This chapter shall not affect any newspaper magazine, or other publication entered as second class matter by the postoffice department.

Sec. 2. Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance to-

gether with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3 to 6 inclusive of this chapter.

Sec. 3. Whenever a nuisance exists, the attorney general, the prosecuting attorney of the county in which such nuisance exists, or any person who is a resident of such county may bring an action to abate such nuisance and to perpetually enjoin the person maintaining the same from further maintenance thereof. If such action is instituted by a person other than the prosecuting attorney, or attorney general, the complainant shall execute a bond to the person against whom complaint is made, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than one thousand dollars ($1,000), to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the injunction ought not to have been granted. The party thereby aggrieved by the issuance of such injunction shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action. A person, other than the prosecuting attorney or attorney general, who so institutes an action and executes a bond shall have a right to recover such bond and reasonable attorney's fees incurred by him in trying the action, if the existence of a nuisance is admitted or established in an action as provided in this chapter; Provided that attorney's fees shall not be recovered in any case in which the prosecuting attorney, attorney general, or any of their deputies have acted as attorneys in such action.

Sec. 4. The action, provided in section 3 of this chapter, shall be brought in the circuit or superior court of the county in which the property is located. At the commencement of the action a verified petition alleging the facts constituting the nuisance shall be filed in the office of the clerk of the circuit court.

After the filing of the petition, application for a temporary injunction may be made to the court who shall grant a hearing within ten (10) days after the filing. Where such application for a temporary injunction is made, the court may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court granting or refusing such temporary injunction and until the further order of the court thereon. The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance. Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect.

A copy of the complaint, together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least five (5) days before such hearing. If the hearing

is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course. If upon hearing, the allegations of the petition are sustained to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond restraining the defendant and any other person from continuing the nuisance. If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five (5) days' notice of the hearing and unless such person shows to the satisfaction of the court that the nuisance complained of is abated, the court shall forthwith issue an order closing the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided if already issued, or, if not so issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located therein. Such restraining order shall be served and the inventory of such property shall be made and filed as provided in this section. The owner of any real or personal property closed or restrained or to be closed or restrained may appear between the filing of the petition and the hearing on the application for a permanent injunction and, upon payment of all costs incurred and upon the filing of a bond by the owner of the real property, with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept until the decision of the court is rendered on the application for a permanent injunction, then the court, if satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance and that, with reasonable care and diligence, such owner could not have known thereof, shall deliver such real or personal property, or both, to the respective owners thereof, and discharge or refrain from issuing at the time of the hearing on the application for the temporary injunction any order closing such real property or restraining the removal or interference with such personal property. The release of any real or personal property, under this section, shall not release it from any judgment, lien, penalty, or liability to which it may be subjected.

Sec. 5. The action, provided for in sections 3 and 4 of this chapter, shall be set down for trial without delay and shall have precedence over all other cases except crimes, election contests, or injunctions. In such action, evidence of the general reputation of the place or an admission or finding of guilt of any person under the criminal laws against prostitution, lewdness, or assignation at any such place is admissible for the purpose of proving the existence of said nuisance and is prima-facie evidence of such nuisance and of knowledge of and of acquiescence and participation therein on the part of the person charged with maintaining said nuisance. If the complaint is filed by a person who is a resident of the county it shall not be dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action ought not to be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued more than once, any person who is a resident of the county, or has an

office therein, or the attorney general or the prosecuting attorney, may be substituted for the complainant and prosecute said action to judgment. If the action is brought by a person who is a resident of the county and the court finds that there were no reasonable grounds or cause for said action, the costs may be taxed to such person. If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of and the defendant from maintaining such nuisance elsewhere.

Sec. 6. If the existence of a nuisance is admitted or established in an action as provided in this chapter, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of the personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in section 4 of this chapter, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Obscene materials as referred to in Sec. 1 (c) of this chapter shall be confiscated and destroyed. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in section 4 of this chapter, or, if not so furnished shall continue for one (1) year any closing order issued at the time granting the temporary injunction, or if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for further maintaining the nuisance at the place, and keeping it closed for a period of one (1) year unless sooner released. The owner of any place closed and not released under bond may then appear and obtain such re-

lease in the manner and upon fulfilling the requirements provided in section 4 of this chapter. The release of the property under this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject. Owners of unsold personal property and contents so seized must appear and claim the same within ten (10) days after such order of abatement is made and prove innocence, to the satisfaction of the court, of any knowledge of said use thereof and that with reasonable care and diligence they could not have known thereof. Every defendant in the action is presumed to have had knowledge of the general reputation of the place. If such innocence is established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court.

Sec. 7. In case of the violation of any injunction or closing order, granted under this chapter, or of a restraining order or the commission of any contempt of court in proceedings under such sections, the court, may summarily try and punish the offender. The trial may be had upon affidavits or either party may demand the production and oral examination of the witnesses.

Sec. 8. Whenever a permanent injunction issues against any person for maintaining a nuisance, there shall be imposed upon said nuisance and against the person maintaining the same a tax of three hundred dollars ($300). Such tax may not be imposed upon the personal property or against the owner thereof who was found innocent as provided in section 6 of this chapter, or upon the real prop-

erty or against the owner thereof who shows to the satisfaction of the court at the time of the granting of the permanent injunction, that he has, in good faith, permanently abated the nuisance complained of. The imposition of said tax shall be made by the court as a part of the proceeding and the clerk of said court shall make and certify a return of the imposition of said tax thereon to the county auditor, who shall enter the same as a tax upon the property and against the persons upon which or whom the lien was imposed as and when other taxes are entered, and the same shall be and remain a perpetual lien upon all property, both personal and real, used for the purpose of maintaining said nuisance except as excepted in this section until fully paid. Any such lien imposed while the tax books are in the hands of the auditor shall be immediately entered therein. The payment of said tax shall not relieve the persons or property from any other taxes. The provisions of the laws relating to the collection of taxes in this state, the delinquency thereof, and sale of property for taxes shall govern in the collection of the tax prescribed in this section in so far as the same are applicable, and the said tax collected shall be applied in payment of any deficiency in the costs of the action and abatement on behalf of the state to the extent of such deficiency after the application thereto of the proceeds of the sale of personal property, and the remainder of said tax, together with the unexpended portion of the proceeds of the sale of personal property shall be paid to the county treasurer.

Sec. 9. When a nuisance is found to exist in any proceeding under this chapter, and the owner or agent of such place whereon the same has been found to exist was not a party to such proceeding, and did not appear therein, the tax of three hundred dollars ($300) imposed under section 8 of this chapter, shall, nevertheless, be imposed

against the persons served or appearing and against the property as set forth in this section. Before such tax is enforced against such property, the owner or agent thereof shall have appeared therein or shall be served with summons therein, and existing laws, regarding the service of process, shall apply to service in proceedings under this chapter. The person in whose name the real estate affected by the action stands on the books of the county auditor for purposes of taxation is presumed to be the owner thereof, and in case of unknown persons having or claiming any ownership, right, title, or interest in property affected by the action, such may be made parties to the action by designating them in the petition as "all other persons unknown claiming any ownership, right, title, or interest in the property affected by the action." Service thereon may be had by publication in the manner prescribed in IC 1971, 34-5-1-1. Any person having or claiming such ownership, right, title, or interest, and any owner or agent in behalf of himself and such owner may make defense thereto and have trial of his rights in the premises by the court; and if said cause has already proceeded to trial or to findings and judgment, the court shall, by order, fix the time and place of such further trial and shall modify, add to, or confirm such findings and judgment. Other parties to said action shall not be affected thereby.

Sec. 10. In case the existence of a nuisance is established in a criminal proceeding, the prosecuting attorney shall proceed promptly, under this chapter, to enforce this chapter and the finding of the defendant guilty in such criminal proceedings unless reversed or set aside shall be conclusive as against such defendant as to the existence of the nuisance. All moneys collected under this chapter shall be paid to the county treasurer. The proceeds of the sale of the personal property, as provided in section

6 of this chapter shall be applied in payment of the costs of the action and abatement including the complainant's costs or so much of such proceeds as may be necessary except as provided in sections 7 to 10 inclusive of this chapter.